Banque Nationale De Paris v Lee Chiong Woo

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–354 OF 1999–III(II)
ZAKARIA SAM JC
21 NOVEMBER 2000

Civil procedure *— Judgment — Foreign judgment — Registration of Singaporean judgment — Setting aside registration of foreign judgment — Whether prior permission of controller of foreign exchange needed before performance of guarantee — Whether guarantee illegal and unenforceable — Exchange Control Act 1953 ss 9(1), 36(1)*

The defendant is a guarantor by virtue of a letter of guarantee dated 12 October 1996 executed in Singapore. The borrower is Pomerton Ltd who has its registered office in the British Virgin Islands and the facility granted to it was USD10m. On 12 August 1999, judgment in default was entered against the defendant in the High Court of Singapore ('Singapore judgment') for a sum of RM40,179,838.77. On 14 December 1999, the Singapore judgment was registered as the judgment of the High Court in Sabah and Sarawak and on 24 February 2000, a notice dated 2 February was served on the defendant giving him 14 days from date of service to set aside the registration. On 3 March 2000, the defendant filed an application to set aside the registration citing, inter alia, that the enforcement of the judgment was contrary to public policy in Malaysia as the prior written permission of the controller of foreign exchange (who is the governor of Bank Negara) had not been obtained for the execution of the guarantee dated 12 October 1996, therefore contrary to the provisions of the Exchange Control Act 1953 ('the Act') and thus the guarantee is illegal and unenforceable as it contravenes the Act, and that it was against public policy to register a judgment based on an illegal and unenforceable guarantee. The defendant relied on ss 9(1) and 36(1) of the Act and on the ECM notice issued pursuant to the Act, paras 4 and 4.3 which states, inter alia, that prior permission of the controller is required for a resident to make payment to a non resident concerning a guarantee.

Held, dismissing the application with costs to the plaintiff to be taxed unless agreed:

The Court followed the decision in the case of *American Express Sdn Bhd v Dato' Wong Kee Tat & Ors* [1990] 1 MLJ 91, in that the applicants have wrongly interpreted the words 'at the time of the contract' in s 36(1) of the Act to mean that permission of the controller is required at the time guarantess are signed. The Court was of the opinion that if permission was not obtained before the performance of the contract, performance is postponed until permission is obtained, performance being payment from persons from Malaysia to persons outside of Malaysia, and this does not prevent the creditor from suing and obtaining judgment. O 22 rr 1 and

9 of the Rules of the High Court 1980 illustrates that this is the proper interpretation of ss 4 and 9 read with s 36(1) of the Act. The Court also stated that the guarantees executed are perfectly good and valid and are not in contravention of the Act, and as such the issue of illegality of the contract does not arise (see pp 409H–410A, D–E).

[**Bahasa Malaysia summary**

Melalui sepucuk surat jaminan yang bertarikh 12 Oktober 1996 yang dilaksanakan di Singapura, defendan menjadi penggerenti. Peminjam adalah Pomerton Ltd yang mempunyai pejabat berdaftarnya di Kepulauan British Virgin, telah diberi kemudahan kewangan sebanyak USD10j. Pada 12 Ogos 1999, penghakiman ingkar telah dicatatkan terhadap defendan di Mahkamah Tinggi Singapura ('Penghakiman Singapura') untuk sejumlah wang sebanyak RM40,179,838.77. Penghakiman Singapura telah didaftarkan sebagai penghakiman Mahkamah Tinggi di Sabah dan Sarawak pada 14 December 1999, dan pada 24 Februari 2000, notis yang bertarikh 2 Februari 2000 telah disampaikan ke atas defendan yang memberikannya tempoh 14 hari dari tarikh penyampaian notis untuk mengetepikan pendaftaran tersebut. Defendan telah pada 3 Mac 2000 memohon untuk mengetepikan pendaftaran dengan menyatakan bahawa penguatkuasaan penghakiman tersebut bercanggah dengan kepentingan awam di Malaysia oleh kerana kebenaran terlebih dahulu daripada pengawal pertukaran wang asing (beliau juga merupakan gabenor Bank Negara) tidak diperolehi untuk perlaksanaan jaminan yang bertarikh 12 Oktober 1996 dan ini bertentangan dengan peruntukan Akta Kawalan Pertukaran Wang 1953 ('Akta tersebut') menjadikan jaminan tersebut salah disisi undang-undang dan tidak boleh dikuatkuasakan, dan ia bercanggah dengan kepentingan awam untuk mendaftarkan penghakiman yang berdasarkan jaminan yang menyalahi undang-undang dan tidak boleh dikuatkuasakan. Defendan telah bergantung kepada ss 9(1) dan 36(1) Akta tersebut dan kepada notis ECM yang dikeluarkan mengikut Akta tersebut, perenggan-perenggan 4 dan 4.3 yang menyatakan, inter alia, bahawa kebenaran terlebih dahulu pengawal pertukaran wang asing diperlukan untuk membolehkan pemastautin membuat bayaran kepada bukan pemastautin berkenaan dengan jaminan.

Diputuskan, menolak permohonan tersebut dengan kos kepada plaintif untuk ditetapkan kecuali sebaliknya:

Mahkamah mengikut kes *American Express Sdn Bhd v Dato' Wong Kee Tat & Ors* [1990] 1 MLJ 91 dengan mengatakan bahawa pemohon telah mentafsir dengan salah perkataan-perkataan 'at the time of the contract' didalam s 36(1) Akta tersebut untuk bermakna bahawa kebenaran pengawal diperlukan ketika jaminan tersebut ditandatangani. Mahkamah berpendapat bahawa jikalau kebenaran tidak diperolehi sebelum perlaksanaan perjanjian, perlaksanaan

tersebut akan ditangguhkan sehingga kebenaran diperolehi, dan perlaksanaan disini bermaksud bayaran daripada pemastautin ke bukan pemastautin. Ini tidak menghalang pemiutang daripada menyaman dan memperoleh penghakiman. Aturan 22 kk 1 dan 9 Kaeda-Kaedah Mahkamah Tinggi 1980 menunjukkan bahawa tafsiran sebegini adalah tafsiran tepat ss 4 dan 9 dibaca dengan s 36(1) Akta tersebut. Mahkamah juga menyatakan bahawa jaminan yang dilaksanakan adalah sah dan tidak melanggar Akta tersebut dan oleh itu, tiada isu kepenyalahan undang-undang perjanjian tersebut. (lihat ms pp 409H–410A, D–E)]

Notes

For cases on setting aside foreign judgment, see 2(2) *Mallal's Digest*, (4th Ed, 1998 Reissue) Paras 2601–2606.

Cases referred to

American Express Sdn Bhd v Dato Wong Kee Tat & Ors [1990] 1 MLJ 91 (folld)

Legislation referred to

Exchange Control Act 1953 ss 9(1), 36(1)

Gabriel Wong (*Ting Goh & Assoc*) for the plaintiff.
Rosleenda Sayumi (*Idris & Co*) for the defendant.

Zakaria Sam JC. : The defendant in this case is a guarantor by virtue of a letter of guarantee dated 12 October 1996 executed in the Republic of Singapore. The borrower is Pomerton Ltd whose registered office is in the British Virgin Islands. The facility granted to the borrower is for USD10m.

On 12 August 1999, judgment in default was entered against the defendant in the High Court in the Republic of Singapore ('Singapore judgment') for a sum of RM40,179,838.77.

The plaintiff had on 14 December 1999 registered the Singapore judgment as judgment of the High Court in Sabah and Sarawak.

A notice dated 2 February 2000 was served on the defendant on 24 February 2000 giving him a period of 14 days from the date of service to set aside the registration.

Pursuant thereto the defendant filed this application (dated 3 March 2000) to set aside the registration of the Singapore judgment.

The grounds of the said application are as follows:

(a) That the enforcement of the judgment is contrary to public policy in Malaysia in so far as neither the defendant nor the plaintiffs had obtained prior written permission of the controller of foreign exchange who is the governor of Bank Negara, contrary to the provisions of the Exchange Control Act 1953 for the execution of the guarantee dated 12 October 1996.

(b) That the guarantee dated 12 October 1996 is illegal and unenforceable as it contravenes the provisions of the Exchange Control Act 1953.

(c) That it would be against public policy of Malaysia to register a judgment based on an illegal and unenforceable guarantee in contravention with the Exchange Control Act 1953.

In filing this application the defendant is relying very much on ss 9(1) and 36(1) of the Exchange Control Act 1953 which reads:

> Section 9(1) Except with the permission of the Controller, no person shall; in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the scheduled territories.
>
> Section 36(1) It shall be an implied condition in any contract that, where; by virtue of this Act, the permission or consent of the Controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required.

In addition thereto, the defendant also referred this court to the ECM notice issued pursuant to the Exchange Control Act in particular paras 4 and 4.3 which reads:

> Para 4 The prior permission of the controller is required for:
>
> 4.3 A resident to make payment in Ringgit to a non-resident in relation or consequential to any guarantee.

It is the defendant's contention that these three provisions clearly state that for any payment to be made to non-residents in Ringgit Malaysia, the permission of controller of foreign exchange, ie the governor of Bank Negara is required. Even before the execution of the guarantee, such permission must be obtained first. Therefore the contract between the plaintiff and defendant is illegal due to the non-compliance of the mandatory provision of the Exchange Control Act 1953 and the ECM notice issued thereunder. It is further contended that it is against public policy of Malaysia to register a judgment based on illegal and unenforceable guarantee.

What is the true construction of these provisions? The answer could be found in *American Express Sdn Bhd v Dato Wong Kee Tat & Ors* [1990] 1 MLJ 91 where the Supreme Court held that:

> What we think has clearly misled the respondents in the instant case are the words 'at the time of the contract' appearing in s 36(1) to mean that prior permission of the Controller is required at the time the guarantees are signed and as no such permission had been obtained, the guarantees are illegal and therefore unenforceable. In our view, what that subsection means is that if at the time of the contract the law requires that the permission of the Controller must first be obtained before its performance, then the performance is postponed until the permission is obtained. The performance in this context is the payment from Malaysia to persons outside Malaysia. The postponement of performance, however, does not prevent the creditor from suing and

obtaining judgment. That this is the correct interpretation of ss 4 and 9 read with s 36 is further illustrated by RHC O 22 rr 1 and 9 providing for the payment into court and payment out under the Exchange Control Act 1953. The statutory form of the writ also draws attention to the Exchange Control Act 1953 and is clearly shown on the writ in the present case.

Having said that the Supreme Court proceeded to decide on the facts of the case whereby it was held that:

> On the facts of this case, it is clear that the entire transaction was between two companies resident in Singapore and the moneys lent and borrowed were in US currency. It is equally clear that the respondents were neither the lenders nor the borrowers. They were the guarantors or third parties to the transaction. The signing of the guarantees in Malaysia, in our view, is not an act which is preparatory to lending foreign currency to persons outside Malaysia within the meaning of s 4(2). Nor is the prior permission of the Controller required before signing the guarantees under s 4(2).
>
> The prior permission of the Controller is also not required under s 9(1) before a foreign plaintiff can sue the defendants in Malaysia as such an act is not preparatory to making payments outside Malaysia. Section 9(1) will only apply after judgment has been obtained and that too only if the foreign plaintiff insists on payment outside Malaysia.
>
> Be that as it may, we find that the guarantees executed by the respondents in the present case are perfectly good and valid guarantees and are in no way in contravention of the Exchange Control Act 1953 as there has been no contravention of s 4(2); there is no evidence that if and when the guarantees are to be honoured the parties intended performance without the permission of the Controller and accordingly s 36 applies. As the guarantees are not in breach of the Exchange Control Act 1953, the issue of illegality of contract under the Contracts Act 1950 does not arise.

As the facts of the present appeal are similar to the *American Express Sdn Bhd*'s case the above decision comprehensively answered all the issues raised by the defendant.

I therefore dismissed the application dated 3 March 2000 with costs to the plaintiff to be taxed unless agreed.

Application dismissed with costs to the plaintiff to be taxed unless agreed.

Reported by Chew Phye Ken